Supreme Court, U. S.
FILED
AUG 27 1980
MICHAEL RODAK, JR., CLERK

No. 79-939

In the Supreme Court of the United States

OCTOBER TERM, 1979

DELAWARE STATE COLLEGE, ET AL., PETITIONERS

v.

COLUMBUS B. RICKS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

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QUESTIONS PRESENTED

1. Whether, in a case in which a college faculty member alleges that he was discriminated against on the basis of national origin in connection with his discharge from employment, the limitations period for filing a charge under Section 706(e) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(e), runs from the date on which he was actually discharged or from some earlier date on which the college notified him that it had decided to deny him tenure and to terminate his employment.

II

2. If the limitations period in this case began to run from the date of the petitioners' final decision to deny respondent tenure and to terminate his employment, whether the complaint was properly dismissed on the pleadings where there are unresolved issues of fact regarding whether petitioners' final decision was made and communicated to respondent within the applicable 300-day limitations period.

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The opinion of the court of appeals is reported at 605 F.2d 710. The opinions of the district court (Pet. App. 20a–52a) are unofficially reported at 22 Fair Empl. Prac. Cas. 788.

JURISDICTION

The judgment of the court of appeals was entered on September 18, 1979. The petition for a writ of certiorari was filed on December 17, 1979, and was granted on February 19, 1980 (J.A. 102–103). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

INTEREST OF AMICI CURIAE

Petitioners challenge the timeliness of a charge filed with the Equal Employment Opportunity Commission by the plaintiff in a private civil action brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* The Equal Employment Opportunity Commission is the federal agency responsible for administering, interpreting and enforcing federal employment discrimination statutes, including Title VII, and the filing of a timely charge with the Commission is a prerequisite to the Commission's assumption of jurisdiction over it. Moreover, private employment discrimination suits such as this provide the Commission with essential assistance in the enforcement process. See *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 45 (1974).

Adoption of petitioners' view that the statute of limitations runs from the date that an employer signifies the intent to discharge an employee, rather than from the clearly-defined and readily apparent date of actual discharge, would greatly increase the burden on the Commission and the courts, which would be required to determine when an employer's subjective intent to discharge became "final," and when the employee knew (or, perhaps, reasonably should have known) that the employer's decision was "final." In situations such as the present, in which a

statement of the employer's intent to discharge the employee may be tentatively announced up to a year before the employee actually ceases work, the difficulties inherent in ascertaining the point at which a "final" decision is reached would force a prudent employee to interrupt the purely internal decision-making process that ordinarily precedes the discharge of an employee.

For these reasons, petitioners' interpretation would substantially complicate the Commission's enforcement of Title VII.

STATEMENT

The district court in the present case dismissed respondent's complaint alleging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and 42 U.S.C. 1981,[1] finding the action untimely under both statutes. The court of appeals reversed as to both. Because the case was dismissed on the pleadings, the allegations in the complaint must, for present purposes, be taken as true. See, *e.g.*, *Hospital Bldg. Co.* v. *Rex Hospital Trustees*, 425 U.S. 738, 740 (1976). As it happens, however, many of the pertinent facts are not in dispute.

1. Respondent, who is of Liberian origin (Pet. App. 3a, 21a), was employed as a professor of education by petitioner Delaware State College under a succession of identical one-year contracts running from September 1 through June 30.[2] Under the terms of his appointment to the faculty, respondent was to be considered for tenure following his second year at the college (J.A. 14). In early 1973, respondent was considered for but was denied tenure, and he was given another one-year contract for the

[1] The complaint also alleges jurisdiction under other federal statutes and pendent jurisdiction on a contract claim. On appeal, respondent abandoned all but the Title VII and Section 1981 claims. See Pet. App. 5a.

[2] Copies of these contracts were attached, as Exhibits B through F, to Defendants' Opening Brief in Support of Their Motions for Dismissal and Judgment on the Pleadings, filed in the district court.

1973–1974 academic year (Pet. App. 3a; J.A. 15–16). Respondent alleges that he was falsely and maliciously accused of being a poor teacher and was subjected to interference or harassment in the performance of his duties during the time he was employed by the College, and that he was denied a particular position in 1973 that was given to an "american * * * with fewer qualifications and less experience" (J.A. 16–18).

In February 1974, a faculty committee on tenure and promotions recommended that respondent be denied tenure, and the College's Board of Trustees accepted or endorsed that recommendation in March 1974 (Pet. App. 3a; J.A. 19–21, 52). Respondent alleges that he was not notified of the reasons for the Committee's recommendation and was not, at that stage, afforded the opportunity to present his position in a hearing or otherwise (J.A. 20–21). On April 23, 1974, respondent, through established procedures, requested that the Educational Policy Committee of the Board of Trustees hold a meeting to consider his tenure status, as well as certain conduct by his superiors, the history of his salary arrangements at the College, and other matters (J.A. 50–51). The Committee held a hearing on these matters in May 1974 (J.A. 21).

By letter dated June 26, 1974 (J.A. 52–53), the President of the Board of Trustees informed respondent that the Chairman of the Educational Policy Committee had told him (the President) that a decision on respondent's grievance would not be forthcoming from the Committee until sometime in July.[3] The letter continued:

> In order to comply with the 1971 Trustee Policy Manual and AAUP requirements [4] with regard to the

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[3] Thus, there would appear to be no basis in the record for the court of appeals' statement (Pet. App. 3a–4a) that the Committee determined in May 1974 that the denial of tenure to respondent was proper.

[4] "AAUP" presumably refers to the American Association of University Professors. The AAUP "Standards for Notice of Nonreappointment" provide that such notice, or notice of intention not to recommend reappointment to the governing board, should be given in writ-

> amount of time needed in proper notification of non-reappointment for non-tenured faculty members, the Board has no choice but to follow actions according to its official position prior to the grievance process, and thus, notify you of its intent not to renew your contract at the end of the 1974-75 school year.
>
> Please understand that we have no way of knowing what the outcome of the grievance process may be, and that this action is being taken at this time in order to be consistent with the present formal position of the Board and AAUP time requirements in matters of this kind. Should the Educational Policy Committee decide to recommend that you be granted tenure, and should the Board of Trustees concur with their recommendation, then of course, it will supersede any previous action taken by the Board.

On August 16, the President of the College signed the contract for academic year 1973-1974 and delivered it to respondent. Respondent signed the contract on September 4. See Exh. B, note 2, *supra*. That contract, like the contracts respondent had signed for previous academic years, provided that "either party shall notify the other in writing on or before March 1st if his services are not to continue for the school year subsequent to that notice" (*ibid.*).

On September 12, 1974, presumably after it received the recommendation of its Educational Policy Committee, the Board of Trustees notified respondent that it would not reverse the February 21, 1974, denial of tenure (Pet. App. 29a; J.A. 21-22). Respondent was relieved of his teaching responsibilities in October of that year by a person whom respondent alleges was "a less qualified american" (J.A.

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ing "[a]t least twelve months before the expiration of an appointment after [the faculty member has served] two or more years in the institution." American Association of University Professors, *AAUP Policy Documents and Reports* 4, 15 (1977). We are lodging a copy of this compendium with the Clerk of this Court. It appears that the Trustees' Policy Manual, in accordance with the AAUP policy, required that notice of nonreappointment be given to respondent before July 1, 1974.

18).[5] Respondent's Department Chairman assaulted him on December 11, an event which led to the Chairman's conviction on criminal charges and, apparently, to his replacement as Chairman (J.A. 22-23). Respondent alleges that the new Acting Chairman gave him a favorable evaluation on or about January 30, 1975, but that the Academic Dean nevertheless permitted the former Department Chairman to evaluate respondent's conduct on February 5 and concurred in the former Chairman's "wilfully and maliciously given and false" report (*ibid.*). Respondent further alleges that the President of the College failed to inquire into the conduct of the Academic Dean and the former Department Chairman, and that sometime around January 30, 1975, he "reconfirmed the September 12, 1974 decision of the [petitioner] Board of Trustees"[6] in reliance on the former Department Chairman's evaluation (J.A. 22-24).

2. Respondent submitted a charge of discrimination to the EEOC on April 4, 1975, and to the appropriate state agency on April 11, 1975 (Pet. App. 25a-26a & n.8). In each charge, respondent stated that he would "be terminated as a professor of science education" on May 31, 1975 (the scheduled date was actually June 30, 1975 (Pet. App. 22a n.7)), alleged discrimination on the basis of national origin, and requested a complete investigation "[i]f this problem [could not] be resolved before May 31, 1975."[7] The state agency notified respondent by letter dated April

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[5] Petitioners admit that respondent was relieved of his duties, but assert in their answer that respondent agreed to be replaced in one of the courses (J.A. 40).

[6] Respondent alleges that the President of the College (not the President of the Board of Trustees) also "reconfirmed" the Board of Trustees' September 12 decision on or about January 15, 1975 (J.A. 22).

[7] Respondent's charge of discrimination filed with the EEOC is reproduced in Appellant's Appendix in the Court of Appeals, at A-18, and his charge filed with the Delaware Department of Labor is attached as Exhibit A to an affidavit submitted to the district court by respondent along with his Opposition to Defendants' Motion to Dismiss and Judgment on the Pleadings.

28, 1975, that it had waived jurisdiction of his claim to the Baltimore office of the EEOC. Exh. A, note 7, *supra*. EEOC files show that the Baltimore office filed the charge on that date.

Respondent received his "right-to-sue" letter in July 1977, and filed the instant action on September 7, 1977, alleging violations of Title VII and 42 U.S.C. 1981. He alleges in his complaint that the various actions described above had denied him "his right to be free from employment discrimination" in violation of 42 U.S.C. 1981 and 2000e-5 "in that [petitioners] treated [respondent] differently from other faculty members because of his national origin" (J.A. 25). He sought reinstatement and back pay, an award of "tenure and all rights attendant thereto" effective September 30, 1972,[8] and compensatory and punitive damages (J.A. 27-28).

3. The district court concluded that "the alleged violation occurred when the Board of Trustees denied [respondent] tenure and awarded him a terminal contract" (Pet. App. 30a; see also *id.* at 31a, 32a), and dismissed the complaint as untimely because "the complaint affirmatively alleges that the Board of Trustees had decided to deny [respondent] tenure and to award him a terminal contract, and had communicated this to [respondent] by June 26, 1974" (*id.* at 33a). In the district court's view, "the actual termination on June 30, 1975, cannot be considered a separate action" giving rise to a cause of action under Title VII (*id.* at 31a) because the expiration of the terminal contract on that date "simply added nothing to his claim" based on the denial of tenure and award of the terminal contract (*id.* at 32a).

The court also dismissed the count arising under 42 U.S.C. 1981 because it was not filed within three years of June 26, 1974, the period of time allowed by the applicable state statute of limitations. Del. Code Ann. tit. 10, § 8106 (1953). See Pet. App. 34a-36a; *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454 (1975).

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[8] Respondent alleges that he first should have been considered for tenure in 1972, not 1973 (J.A. 15).

4. The court of appeals reversed, holding that the period within which a charge must be filed with the EEOC under Titie VII ~~and an action must be filed under Section 1981~~ began to run on June 30, 1975, when respondent's employment with the College was terminated (Pet. App. 1a–17a).

Because it viewed the termination as the critical event for limitations purposes, the court of appeals also held that the Section 1981 claim was timely, because it was filed within three years of June 30, 1975 (Pet. App. 15a–16a).

SUMMARY OF ARGUMENT

I

A. Under Section 706(e) of the Civil Rights Act of 1964, 42 U.S.C. 2000e–5(e), a person who has initially instituted state proceedings with respect to an alleged unlawful employment practice must file a charge of discrimination with the Equal Employment Opportunity Commission within 300 days "after the alleged unlawful employment practice occurred." In this case, respondent alleges that he was discriminated against on the basis of national origin in connection with his discharge from employment by petitioner Delaware State College on June 30, 1975. Because respondent initially instituted state proceedings with respect to these allegations, he was permitted to file a charge of discrimination with the EEOC at any point up to 300 days after the termination of his employment. Respondent's charge, submitted to the EEOC on April 4, 1975, was filed on April 28, well before this deadline. This conclusion is supported by the decisions of this Court. See, *e.g.*, *Electrical Workers* v. *Robbins & Myers, Inc.*, 429 U.S. 229, 234–235 (1976).

B. Petitioners' argument that the limitations period in this case began to run from the time the College finally decided to deny respondent tenure and to terminate his employment, rather than when his employment actually was terminated, is without merit. The tenure and termination decision was only an expression of intent on the part of the College to terminate respondent's employment as of

June 30, 1975. Title VII is concerned with unlawful employment *practices*, not discriminatory intent standing alone. It is therefore consistent with the purposes of Title VII to measure the limitations period from the time an employer carries out a prohibited discharge or other practice, not from the point antecedent in time when the employer formed or communicated the intent to do so.

A denial of tenure may also be an unlawful employment practice in its own right, quite apart from whether the faculty member is later discharged, because of the effect a denial of tenure may have on the faculty member's salary, job security, prestige, or other aspects of the employment relationship. But respondent's complaint concerns more than the effect of the tenure decision on his employment relationship with the College while still employed there. It focuses on the denial of tenure merely as a stage in a process that led to the termination of his employment—a process that also included a notice of nonreappointment, the offer of a terminal year contract, the formal internal review procedure, reevaluation of his performance by the acting department chairman and academic dean, and the eventual discharge. The legislative history of the 1972 amendments to Title VII supports the view that the limitations period begins to run from the final stage in such a process, when the unlawful employment practice is actually carried out.

Petitioners' reliance on *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553 (1977), is misplaced. Here, unlike *Evans*, respondent is challenging his discharge from employment. And that discharge is not an attenuated consequence of an earlier employment practice, as in *Evans;* the discharge is the very eventuality to which the tenure decision, notice of nonreappointment, the terminal year contract, and internal review procedures were directed.

C. The rule petitioners propose—attaching significance to when the employer decides to institute an unlawful employment practice, rather than when he actually carries it out—would create pervasive uncertainty for employees

and employers in Title VII cases. Determining when an employer's decision to engage in an unlawful employment practice became "final" would also create additional threshold issues of fact for the EEOC and the courts in the application of the already complex filing rules under Title VII. There is, moreover, no basis for singling out universities and colleges for a special rule under which the limitations period would begin to run from a point in advance of the date of discharge.

II

Even if the Court were to conclude that the limitations period in this case began to run at some point prior to the date of discharge, dismissal of the complaint for failure to satisfy Title VII limitations requirements was inappropriate.

A. The limitations period applicable in this case was 300 days, not the 180-day period the parties and the courts below assumed. Respondent initially instituted state proceedings by filing a charge with the state agency on April 11, 1975, and the EEOC properly filed respondent's complaint when state proceedings were terminated on April 28, 1975. *Mohasco Corp.* v. *Silver*, No. 79-616 (June 23, 1980). Any event occurring within the 300-day period before that date—*i.e.*, on or after July 2, 1975—was within the limitations period.

B. The complaint in the present case, fairly read, alleges that the decision to deny respondent tenure and to terminate his employment was not made until September 12, 1974, at the earliest. It was on that date that the Board of Trustees completed its formal review process and notified respondent that it would not reverse the faculty's recommendation of the previous February that he be denied tenure. This September 12 date was within the 300-day period, as were the dates on which respondent was offered and signed a one-year contract for the final academic year.

ARGUMENT

I

THE COURT OF APPEALS PROPERLY HELD THAT THE LIMITATIONS PERIOD UNDER SECTION 706(e) OF TITLE VII COMMENCED ON JUNE 30, 1975, WHEN RESPONDENT'S EMPLOYMENT WITH THE COLLEGE WAS TERMINATED

A. The Limitations Period In The Case Of An Allegedly Discriminatory Discharge Begins To Run From The Date Of Discharge

Respondent alleges that he was a victim of discrimination on the basis of national origin in connection with his discharge from employment with petitioner Delaware State College.[9] It is undisputed that respondent's employment with the College was terminated on June 30, 1975, upon the expiration of his final one-year contract (Pet. Br. 7; Resp. Br. 4–6; Pet. App. 4a, 22a n.7). It is also undisputed that on April 28, 1975, respondent filed a charge with the EEOC alleging discrimination on the basis of national origin in connection with the anticipated termination of his employment with the College on June 30, 1975 (Pet. Br. 7; Resp. Br. 2 n.1; Pet. App. 4a, 23a). The question presented is whether that charge was timely filed

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[9] Respondent's charges of discrimination filed with the Delaware Department of Labor and the EEOC each stated that he was about to be terminated as a professor, alleged that he was the victim of discrimination on the basis of national origin, and requested a complete investigation if the problem could not be resolved before his scheduled date of termination. See pages 2–6, *supra*. The notice of the charge of discrimination sent to the College by the EEOC on May 2, 1975, indicated that the charge concerned "terms and conditions" of employment and "discharge." Defendants' Opening Brief in Support of their Motions for Dismissal and Judgment on the Pleadings, Exh. A. And respondent alleged in Count II of his complaint in the district court that the actions of petitioners described in Paragraphs 1–48 denied him his right to be free from employment discrimination on the basis of national origin in violation of Title VII and 42 U.S.C. 1981 (J.A. 25). One such action, described in Paragraph 48, is that respondent was "discharged effective June 1, 1975" (J.A. 24) (the actual date of discharge was June 30, 1975).

with the Commission. A straightforward application of the language of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e–1 *et seq.*, demonstrates that it was.

Respondent's allegedly discriminatory discharge from employment clearly constituted an allegedly "unlawful employment practice" within the meaning of Section 703(a)(1) of the Act, 42 U.S.C. 2000e–2(a)(1), which provides:

> It shall be an unlawful employment practice for an employer—
>
> > (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin * * *.

Section 706(e) of the Act, 42 U.S.C. 2000e–5(e), in turn provides that a charge of discrimination shall be filed "within one hundred and eighty days after the alleged unlawful employment practice occurred," except that where the person aggrieved has initially instituted proceedings with a state or local agency, "such charge shall be filed * * * within three hundred days after the alleged unlawful employment practice occurred * * *." As explained in point II, *infra*, respondent "initially instituted" proceedings with the appropriate state agency and was therefore permitted to file his charge of discrimination with the EEOC at any point up to 300 days "after the alleged unlawful employment practice occurred." Respondent's charge was filed with the EEOC well before the 300th day following the termination of his employment on June 30, 1975—indeed the charge was submitted to the EEOC before his employment was terminated.[10] It necessarily fol-

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[10] Petitioners note (Pet. Br. 38) that respondent submitted his charge to the EEOC before his employment with the College was actually terminated on June 30, but do not appear to argue that this fact would render the charge invalid if, contrary to its submission in this case, the termination of employment is the relevant date for limitations purposes (compare Pet. App. 13a–14a). That argument would

lows that respondent's charge of discrimination was timely under Section 706(e) of the Act.

This conclusion is consistent with the decisions of this Court, which have been premised on the understanding that a "discharge," within the meaning of Section 706(e), occurs on the date the employee stops work and ceases receiving pay (see, *e.g.*, *Electrical Workers* v. *Robbins & Myers, Inc.*, 429 U.S. 229, 234–235 (1976)[11]) and that the applicable limitations period under Section 706(e) in a case

be without merit in any event. If a person aggrieved sends a charge to the EEOC before the date an anticipated unlawful employment practice actually occurs, there is no reason why the EEOC may not properly hold the charge in "suspended animation" (and possibly attempt to avert a violation by informal methods of conciliation) and formally file it after the practice does occur (and after deferral to state procedures, where they are available). *Mohasco Corp.* v. *Silver*, *supra*, slip op. 9; *Love* v. *Pullman Co.*, 404 U.S. 522, 526 (1972). The limitations periods in Section 706(e) were designed to avoid "the costs associated with processing and defending stale or dormant claims." *Mohasco Corp.* v. *Silver*, *supra*, slip op. 12. There is no reason to believe that Congress was concerned about charges that may be received by the EEOC before the discriminatory practice complained of has been completed.

Moreover, respondent's charge was submitted to the EEOC during a period when some concrete steps had already been taken in a process that was eventually to end with the termination of his employment by the College. Respondent can hardly be faulted for submitting a charge to the EEOC in April of 1975 in the hope of forestalling what had become the substantial likelihood that he would be terminated on June 30.

Finally, respondent's charge of discrimination, in the present setting, subsumed a challenge to the tenure decision itself, whether or not that decision would also result in the termination of his employment with the College. Respondent's charge was plainly not "premature" as respects the denial of tenure. Moreover, once a charge is filed, the Commission may consider acts occurring after the filing that are like or related to the claims asserted in the charge. See, *e.g.*, *Ramirez* v. *National Distillers & Chemical Corp.*, 586 F.2d 1315 (9th Cir. 1978). The termination on June 30, 1975, certainly falls in this category.

[11]The Court expressed its approval in *Robbins & Myers* of the common understanding as to when the employee was discharged:

> [The employee] was fired as of October 25, 1971, and all parties so understood. She stopped work and ceased receiving pay and benefits as of that date. * * * Throughout the proceedings * * * both sides appear to have assumed, as did the courts, that the date of discharge was October 25, 1971.

alleging discriminatory discharge commences with the date of actual discharge from employment. 429 U.S. at 234–235; *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553, 555 (1977) (charge not filed by employee "within 90 days of her separation" not timely under pre-1972 law); *Mohasco Corp.* v. *Silver*, *supra*, slip op. 2, 7; *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 455, 463 (1975). See also *Egelston* v. *State University College at Geneseo*, 535 F.2d 752, 755 (2d Cir. 1976); *Doski* v. *M. Goldseker Co.*, 539 F.2d 1326, 1328 (4th Cir. 1976); *Krzyzewski* v. *Metropolitan Government of Nashville & Davidson County*, 584 F.2d 802, 806 (6th Cir. 1978); *Greene* v. *Carter Carburetor Co.*, 532 F.2d 125, 126 (8th Cir. 1976).

B. The College's Prior Decision To Deny Respondent Tenure And Terminate His Employment Was Only An Expression Of Intent To Discharge Him And Did Not Trigger The Running Of The Limitations Period

Petitioners nonetheless contend that the limitations period began to run on the date respondent was denied tenure—which they assert was June 26, 1974—not the date on which respondent's employment with the College was terminated. Petitioners suggest, in essence, that the termination of respondent's employment with the College in June 1975, upon the expiration of his contract, was but a consequence of the previous decision to deny him tenure, and that respondent was therefore required to challenge the allegedly discriminatory tenure decision itself within 180 days of when it was made. This argument ignores the nature of the tenure decision and the termination process.[12]

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[12]This argument in support of the district court's dismissal of the complaint has other defects, explained in point II, *infra*. For example, respondent had 300 days, not 180 days, within which to file a charge with the EEOC. Moreover, petitioners' argument is dependent on the factual assertion that the College made a final decision to deny him tenure and offered him a "terminal year" contract on June 26, 1974. But the complaint, fairly read, alleges that the College did not reach a

Stripped of the weighty procedural apparatus and professional delicacy attendant to a denial of tenure, that denial, when coupled with a "notice of nonreappointment,"[13] is nothing more than an expression of a college or university's *intent* to terminate the employment of a faculty member at some point in the future. But Title VII is not primarily concerned with discriminatory intent, standing alone. Section 706(e) prohibits an employer from engaging in an "unlawful employment *practice*" (emphasis added) which, at least in the present context, connotes the carrying out of a discriminatory intent or decision, not its mere formulation. Only when the intent or decision is executed is the employee injured in a concrete fashion[14]—*e.g.*, through loss of a job, pay, or promotion—and only at that point do the remedial provi-

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final decision to deny him tenure until September 12, 1974, at the earliest, and the record reveals that he was not actually offered a one-year contract until August. These August and September dates fell within the applicable 300-day period. The factual dispute presented by the pleadings and limited record in this case would therefore have a significant effect on the outcome of this case even if petitioners' theory of when the limitations period began to run were correct. This factual dispute could not properly be resolved in the context of petitioners' motion to dismiss the complaint and judgment on the pleadings.

[13]A decision to deny a faculty member tenure need not be accompanied by a decision to terminate the faculty member's employment, as evidenced in the case by the College's decision in 1973 not to grant respondent tenure but instead to offer him another one-year contract and to reconsider him for tenure the following year (Pet. App. 3a; J.A. 15–16).

[14]This case does not involve allegations that the employer has a discriminatory policy that may have an impact on a number of employees, as where it may be alleged that an employer has a uniform policy of not promoting blacks. Such a policy may have the effect of deterring black employees from even applying for a promotion. See *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 365–367 (1977). In that type of case, the policy constitutes more than a bare intent to discriminate; it has a concrete impact on the affected employees, in terms of positions and wages foregone, even though the employer has not had occasion to apply that policy to each of them on an individualized basis in considering requests for promotion. Accordingly, the policy itself is an "unlawful employment practice" in viola-

sions of Title VII have real significance.[15] It is therefore consistent with the structure and purposes of Title VII to measure the limitations period from the date the employer carried out the discharge or other employment "practice" in question, not from the point antecedent in time when the employer formed or communicated his intent to do so. Under this analysis, the 300-day limitations period for the filing of respondent's charge respecting his allegedly discriminatory discharge began to run on June 30, 1975, when his employment with the College was terminated.

There is no basis for departing from that general rule here merely because the College's own contractual provisions or internal procedures provide that a decision to discharge an employee be made at a particular time or in a particular way. This Court has emphasized that the statutory rights under Title VII are independent of the employee's contractual rights and that the limitations provisions in Title VII are not controlled by private contract rights. *Electrical Workers* v. *Robbins & Myers, Inc.*, *supra*; *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974).

We do not mean to suggest, of course, that a denial of tenure to a college faculty member may not also be an "unlawful employment practice" under Section 703(a)(1) in its own right, quite apart from the discharge from em-

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tion of Title VII. See Jackson & Matheson, *The Continuing Violation Theory and the Concept of Jurisdiction in Title VII Suits*, 67 Geo. L.J. 811, 826–831 (1979). An unexecuted intent to discharge an individual employee, as in this case, does not have a similarly immediate impact.

This case also does not concern allegations that the College expressed an intent to discharge respondent for the purpose of *threatening* him and thereby to affect his employment relationship while he was still working for the College. Such a threat, if discriminatory, would itself constitute an "unlawful employment practice" affecting conditions of employment, whether or not it was ever carried out.

[15] Section 706(g), 42 U.S.C. 2000e–5(g), provides that the court may order "reinstatement or hiring of employees, with or without back pay * * * or any other equitable relief as the court deems appropriate." The relief expressly mentioned in the section is tailored to remedying injuries already sustained.

ployment that often follows. Tenured status is certainly a "term," "condition," or "privilege" of employment within the meaning of that Section which can significantly affect the faculty member's job security, prestige, and compensation. Accordingly, if respondent believed that he was discriminated against on the basis of national origin when the College declined to grant him tenure in the spring of 1973 and gave him another one-year contract, he could have filed a charge with the EEOC at that time despite the absence of any specific intent on the part of the College to terminate his employment. Similarly, he could have filed a charge of discrimination based on the denial of tenure in 1974, standing alone, because of the manner in which it may have affected his on-going employment relationship with the College.

But the gravamen of respondent's complaint in the present case goes beyond the terms and conditions of his employment. His complaint focuses on the denial of tenure merely as a stage in the process that led to his discharge from employment—a process that also included the notice of nonreappointment, the offer of a "terminal" one-year contract, exhaustion of the formal internal review procedure, reevaluation of his performance in January by the acting department chairman and academic dean, and the eventual termination of his employment on June 30, 1975. The discharge was not accomplished until the latter date, after the termination process just described was completed.[16]

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[16] As explained in point II, *infra*, the allegations in the complaint indicate that the Board of Trustees did not finally decide to deny respondent tenure until September 12, 1974, when the Board notified respondent that it had accepted the Educational Policy Committee's recommendation that respondent be denied tenure. This was within the 300-day limitations period applicable in this case. Thus, there is no occasion to consider in this case what relief the district court could grant with respect to the denial of tenure if it did not occur within the limitations period, even though the discharge was within that period. Consideration of appropriate relief would be premature in any event, since no finding of liability has been made.

As noted in the text, however, Congress plainly intended that in some instances, the limitations period should be measured from the

Consequently, petitioners' characterization of the court of appeals' treatment of the facts as a "continuing violation" is erroneous. The court of appeals expressly declined to rely on a "continuing violation" theory. The court noted instead that "it is only alleged that the *process of termination* itself was a continuing one" (Pet. App. 15a; emphasis added). In contrast, the alleged "unlawful employment practice"—respondent's discriminatory discharge—was a discrete event, albeit one preceded by a process of termination. The violation complained of was not even completed until respondent's employment was terminated in June 1975, and the limitations period was not intended to begin to run until that time.

Moreover, even if the violation complained of here could fairly be characterized as a "continuing violation," the Section-by-Section Analysis of the 1972 Amendments to Title VII makes clear that the limitations period in Section 706(e) is to be measured from the final discriminatory event:

> Court decisions under the present law have shown an inclination to interpret this time limitation so as to give the aggrieved person the maximum benefit of the law; it is not intended that such court decisions should be in any way circumscribed by the extension of the time limitations in this subsection. Existing case law which was [*sic*] determined that certain types of violations are continuing in nature, thereby measuring the running of the required time period from the last occurrence of the discrimination and not from the first occurrence is continued, and other interpretations of the courts maximizing the coverage of the law are not affected.[17]

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last in a series of related discriminatory occurrences. The denial of tenure and eventual termination, along with intervening steps in the discharge process, would appear to be sufficiently related for these purposes. In any event, the court, as an incident to ordering respondent reinstated, could presumably order that he not be discharged without a tenure review.

[17]This statement in the Section-by-Section Analysis apparently refers to situations in which a particular "unlawful employment practice"

118 Cong. Rec. 7167, 7564 (1972), *reprinted in* Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 92d Cong., 2d Sess., *Legislative History of the Equal Employment Opportunity Act of 1972*, at 1846 (Comm. Print 1972) (hereinafter "*Leg. Hist.*").[18] Since the final event controls for limitations purposes in the context of a "continuing violation," a fortiori, where, as here, the alleged "unlawful employment practice"—respondent's discharge—is not a continuing one, but a discrete event preceded by a process of termination, it is clear that Congress intended the limitations period to begin to run only when the discharge was complete. In short, petitioners' construction of the limitations period of Section 706(e) contravenes the express congressional intent to give the respondent "the maximum benefit of the law."

Finally, petitioners' reliance on *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553 (1977), is misplaced. There, an employee, who declined to file a charge of discrimination with the EEOC in 1968 when she was fired for allegedly discriminatory reasons, was rehired in 1972, but was not credited with seniority for her previous service. The employee then filed a charge with the EEOC. She could not challenge her 1968 discharge, because the then applicable 90-day limitations period following that event had long since passed. She argued instead that the refusal to credit her with seniority after 1972 for her previous service was a continuing violation of Title VII. The Court rejected this argument, finding that although the 1968 discharge (which was complete in 1968) had a continuing *effect* on her, there was no continuing *violation* because the seniority plan itself was neutral in operation. Here, in contrast, re-

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is complete in the sense that it is having a concrete impact on an individual in the form of lost wages or position, even though the practice and its effect may continue over a period of time. See Jackson & Matheson, *supra*, 67 Geo. L. J. at 824-825.

[18] The statue itself reinforces this analysis, for although charges must be filed within 180 or 300 days, monetary relief is available under Section 706(g) for the two-year period preceding the filing. 42 U.S.C. 2000e-5(g).

spondent is challenging his discharge as an act of intentional discrimination within the applicable time periods. The discharge, which did not occur until June 30, 1975, when he left the college, was not an attenuated consequence of an earlier employment practice, as in *Evans;* it was the very eventuality to which the tenure decision, the "notice of nonreappointment," the terminal year contract and the internal review process were directed.

C. The Rule Petitioners Suggest Would Create Considerable Uncertainty And Additional Factual Issues Regarding The Application Of The Already Complex Filing Rules Under Title VII

The rule petitioners suggest would have disturbing ramifications if applied in Title VII cases generally. It is relatively common for an employer to give an employee notice of his termination several days, weeks, or months in advance. Under petitioners' theory, the 180 or 300-day limitations period under Title VII would begin to run when that notice is received, not on the employee's last day of work, because actual termination would be but a "neutral consequence" of the employer's decision to fire him. Such a result would be contrary to the common sense view—and no doubt the shared understanding of most employers and employees (see, *e.g., Electrical Workers* v. *Robbins & Myers, Inc.*, *supra*, 429 U.S. at 234–235)—of when a discharge occurs. It would also be contrary to the decisions of this Court indicating that the limitations period runs from the date the employee ceases work (see page 13, *supra*).

The problems presented by petitioners' argument would be especially pronounced where the employer does not give the employee formal written notice, but instead informs him orally (or the employee learns through the grapevine) of the decision to fire him. How is the employee to know when this decision is "final"? The simplest point of reference, we submit, is when the employee actually ceases work. Until that point, as the court of appeals observed (Pet. App. 7a), the employee may often have rea-

son to believe that the employer will change his mind or that other forces will intercede to prevent the termination.

Moreover, the difficulties presented by petitioners' argument are not confined to situations of allegedly discriminatory discharges; they could arise with regard to any promotion, transfer, or other personnel action where the employer's decision to take the action preceded its execution. Petitioners' position, if applied generally, would therefore create pervasive uncertainty for employers and employees and additional threshold issues of fact to be resolved by the EEOC and the courts in determining the timeliness of complaints under the already complex filing rules set forth in Title VII.

In contrast, the rule adopted by the court of appeals, focusing on the date of discharge, "provides a bright line guide both for the courts and for the victims of discrimination" (Pet. App. 11a; footnote omitted). Petitioners contend that a decision to deny one tenured status is also a clear, identifiable, and discrete act which a lay person can understand and act upon. But, as our discussion in point II demonstrates, it is anything but clear in this case when the College made and communicated a "final" decision to deny respondent tenure and to terminate his employment as of June 30, 1975. Amicus AAUP represents that its recommended procedures for a formal internal review of tenure decisions and notices of nonreappointment are reflected in the internal regulations of hundreds of colleges and universities (Br. 10). Consequently, factual issues similar to those discussed in point II can be expected to arise in Title VII cases in the university setting generally.

Nor have petitioners advanced any reasons (and we can think of none) why a special rule should be fashioned for colleges and universities, under which some event prior to the date of discharge would trigger the commencement of the limitations period in Section 706(e). The legislative history of the 1972 amendments to Title VII, when the exemption for educational institutions contained in the

Civil Rights Act of 1964 was repealed,[19] does not support such a special rule. Congress repealed the exemption for educational institutions because it found discrimination against minorities and women in the field of education to be "as pervasive as discrimination in any other area of employment" and in "especially critical" need of correction (H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 19-20 (1971), *Leg. Hist.* 79-80). And Congress believed it to be "essential that [employees of educational institutions] be given the same opportunity to redress their grievances as are available to other employees in the other sectors of business" (S. Rep. No. 92-415, 92d Cong., 1st Sess. 11-12 (1971), *Leg. Hist.* 420-421).

To be sure, notice of termination is given further in advance in the college or university setting than typically might be the case elsewhere. But this is a difference of degree, not substance, because advance notice is given for the same *reasons* in the college and university setting as elsewhere: to provide enough time for the employee to secure another position. See "The Standards for Notice of Nonreappointment," *AAUP Policy Documents and Reports*, 13 (1977). The point at which educational institutions provide notice of intended termination is largely attributable to the structured hiring process and academic year calendar that most such institutions follow. But, as we have pointed out, it is not apparent why a contract of employment specially tailored to meet an industry's needs or an employer's own internal decision-making and notice policies should affect the meaning of the term "discharge" as used in Title VII or the settled rule of when the limitations period begins to run in the case of an allegedly discriminatory discharge.[20]

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[19] The exemption for educational institutions contained in Section 702 of the Civil Rights Act of 1964, 42 U.S.C. 2000e-1, was deleted by Section 3 of the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103.

[20] The fact that college faculty members are employed under a series of one-year contracts does not warrant a special rule. The contracts involved in the present case, for example, contemplated a continuing employment relationship, because they provided that either party was

Indeed, a rule focusing on the time at which the employer makes and communicates a decision to discharge an employee would be especially inappropriate in the college and university setting precisely because of the period of months that may elapse between the time of notice and actual termination. It would not be uncommon for a faculty member to do what respondent allegedly did in this case: to exhaust all formal and informal review processes within the institution, to request reconsideration and plead for mercy or delay, and to invoke outside legal remedies only near the end of the academic year when it became likely that the college would in fact go forward with its intended termination. If petitioners' rule were applied in other industries, where a shorter time generally elapses between the time the employer expresses an intent to discharge an employee and when he actually does so, an employee who resorted to these measures before being terminated would probably have a substantial portion of the 180 or 300-day period remaining after his discharge within which to invoke the protection of Title VII. But in the university setting, the faculty member who resorted to the evidently more protracted internal review process and other measures in an effort to obtain reconsideration might often find that the limitations period had run by the time it became apparent that internal efforts would not prevent the discharge. This would be particularly so in a state where there was no antidiscrimination agency and where the faculty member therefore had only 180 days within which to file a charge with the EEOC. Such a trap for the unwary faculty member would be particularly inappropriate in view of Congress's express concern for discrimination in educational institutions, when it enacted the 1972 amendments to Title VII.

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to notify the other before March 1st "if [respondent's] services are not to *continue* for the school year subsequent to that notice." Exhs. B-F, note 2, *supra* (emphasis added). The AAUP's "Standards for Notice of Nonreappointment" also state that "a probationary appointment, even though for a fixed or stated term, carries an expectation of renewal * * *." *AAUP Policy Documents and Reports*, *supra*, at 13.

II

DISMISSAL OF THE TITLE VII CLAIM WAS INAPPROPRIATE EVEN ON PETITIONERS' THEORY THAT THE LIMITATIONS PERIOD BEGAN TO RUN WHEN TENURE WAS DENIED

A. Respondent Was Entitled To A Period Of 300 Days Within Which To File A Charge Of Discrimination, Not The 180-Day Period The Parties And The Courts Below Assumed To Be Applicable

Both petitioners and respondent have briefed this case, and both courts below decided it, on the assumption that under Section 706(e) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(e), respondent had only 180 days from the date of the alleged discriminatory occurrence within which to file a charge of discrimination with the EEOC (Pet. Br. 12, 14, 25-26, 34-35, 37-38, 42, 45, 49; Resp. Br. 6, 9; Pet. App. 5a-7a, 12a-13a, 16a, 26a-28a, 33a). This assumption is in error.

Under Section 706(e), a person aggrieved by an unlawful discrimination practice has 300 days to file a charge of discrimination with the EEOC if he "initially instituted" proceedings with a state or local agency with authority to grant or seek relief from that practice. *Mohasco Corp.* v. *Silver*, No. 79-616 (June 23, 1980), slip op. 2, 7-9.[21] Sec-

[21] Delaware law requires that a charge of discrimination must be filed with the Department of Labor within 90 days after the alleged unlawful discrimination practice or 120 days after the discovery thereof, whichever is later. Del. Code Ann. tit. 19, § 712(d) (Supp. 1972). It is not clear how this state limitations provision would be applied to the facts of this case, although we note that the "waiver" of jurisdiction by the Department has been held to indicate that it in fact *exercised* jurisdiction in a matter. See *EEOC* v. *Delaware Trust Co.*, 416 F. Supp. 1040, 1044 (D. Del. 1976). However that may be, Congress did not require that a charge be filed with the state agency within any specific period of time after the alleged discriminatory occurrence—including within the period provided under the state statute of limitations—as a condition to invoking the 300-day limitations period for filing with the EEOC in deferral states. *Mohasco Corp.* v. *Silver*, *supra*, slip op. 6 n.16, 8 n.19; *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 758-764 (1979).

tion 706(c) of the Act in turn provides that the charge of discrimination may not be filed with the EEOC until the state agency has had a period of up to 60 days to consider and attempt to resolve the dispute. 42 U.S.C. 2000e-5(c). However, if the person aggrieved sends his charge of discrimination to the EEOC before he has instituted state proceedings, the EEOC may hold the complaint in "suspended animation" and then automatically file it with the EEOC upon the end of the 60-day deferral period or at such earlier time as the state agency terminates its proceedings. *Mohasco Corp.* v. *Silver*, *supra*, slip op. 9; *Love* v. *Pullman Co.*, 404 U.S. 522, 526 (1972). Thus, in the present case, after the EEOC received respondent's charge of discrimination on April 4, 1975, that charge was properly held by the EEOC in "suspended animation" until respondent instituted proceedings with the Delaware Department of Labor on April 11, 1975, and until the Department of Labor terminated its proceedings on April 28, 1975, by waiving jurisdiction over the subject matter of the complaint. On the latter date, respondent's charge of discrimination automatically was deemed filed with the EEOC for limitations purposes. 29 C.F.R. 1601.12(b)(1)(iii) and (iv) (1975); See also 29 C.F.R. 1601.13(d)(2)(iv) (1979). Any alleged discriminatory occurrence during the 300-day period preceding April 28—*i.e.*, any event occurring on or after July 2, 1974—would therefore be within the applicable limitations period.

B. There Are Unresolved Issues Of Fact Regarding Whether The "Final" Decision To Deny Respondent Tenure And To Terminate His Employment Occurred Within The 300-Day Period

Application of the 300-day, rather than the 180-day, limitations period to the facts of this case would be of considerable significance if the Court were to reject the court of appeals' conclusion, and our argument in point I, *supra*, that the limitations period under Title VII began to run when respondent's employment with the university was terminated on June 30, 1975. The district court stated, for

example, that "the alleged violation occurred when the Board of Trustees denied [respondent] tenure *and awarded him a terminal contract*" (Pet. App. 30a; emphasis added; see also *id.* at 31a). The district court notes that the Board had decided to deny respondent tenure and award him a terminal contract by June 26, 1974. But whenever the Board *decided* to award respondent a new one-year contract, it did not actually *offer* him the contract until August 16, 1974, and respondent did not sign it until September 4. These dates were well within the 300-day limitations period preceding April 28, 1975.

The date on which the contract was offered by the College takes on even more significance when it is noticed that respondent's contract for each of the three preceding academic years had been signed by the President of the Board of Trustees on April 1. Exhs. D–F, note 2, *supra*. The fact that the President did not sign the contract for the 1974–1975 academic year on April 1, 1974—which was after the Board's alleged acceptance in March of the faculty committee's recommendation to deny respondent tenure (Pet. App. 3a; J.A. 19–21)—strongly implies that the Board had not even finally decided by June 26 to offer respondent a terminal contract.

Even if the denial of tenure alone were the date from which the limitations period began to run, as petitioners urge, a fair reading of the complaint raises a genuine issue of fact as to whether the College actually denied respondent tenure before September 12, 1974, when it notified him that it was not altering its decision of the previous spring. This date is also well within the 300-day limitations period.[22] The language of the June 26 letter from the President of the Board of Trustees notifying respondent of his nonreappointment after the 1974–1975 academic year, for example, indicates that it was sent solely

[22] Respondent alleges, for example, that the September 12 letter to him at the conclusion of the grievance process stated that the Board "would not reverse the February 21, 1974 denial of tenure" (J.A. 21). The latter was the date on which the faculty committee recommended against tenure (J.A. 20), not the date on which the Board allegedly accepted the recommendation, which was in March (*ibid.*).

23/ See next page for footnote.

to ensure technical compliance with College and AAUP procedural requirements in the event it should later decide to abide by its initial acceptance in March of the faculty committee's recommendation to deny respondent tenure, not because the Board had reached a considered and final judgment on the tenure decision. The letter states that the Board had "no way of knowing" what the outcome of the grievance process might be, and that a favorable recommendation by the Educational Policy Committee, if accepted, would "of course * * * supersede any previous action taken by the Board" (see page 4, *supra*). This language implies that the Board itself viewed its March decision respecting respondent's tenure to be tentative as of June 26—and perhaps merely a pro forma ratification of the faculty's recommendation pending more thorough consideration in the Board's review process triggered by respondent.[23] The delay in offering respondent a new one-year contract until August[24]—after the July date on which the Educational Policy Committee was scheduled to make its report to the Board on respondent's grievance[25]—also suggests that the Board's position was at most tentative.[26]

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[23] This date is also within the three-year limitation period for the count arising under 42 U.S.C. 1981.

[24] The record does not disclose when the Committee actually made its recommendation.

[25] The contract respondent signed for the 1974–1975 academic year, although frequently referred to in this case as a terminal contract, was identical in form to those signed in previous years. It stated that he would be notified by the following March 1st if his services would not continue for the subsequent school year. This language in the contract implies that a final decision had not been made to terminate respondent's employment (although this provision may have been but the unintended result of using a form contract). The September 12 letter notifying respondent that the decision denying him tenure would not be reversed might have constituted sufficient notice under the contract. This matter could also be explored on remand.

[26] It is also noteworthy that respondent alleges that the President of the College, in January 1975, reconfirmed the September 12 decision of the Board (J.A. 22–23), not a decision of June 26 or of some time in March. Accepting this allegation as true, as we must, the President of the College seems to have viewed the September 12 letter to embody the Board's tenure decision.

Finally, respondent was allegedly not furnished with reasons for the denial of tenure or afforded an opportunity to be heard on that denial until the Educational Policy Committee conducted a hearing in May (J.A. 20–21), after the Board had first accepted the faculty committee's recommendation. The courts should not lightly assume that this formal review process, with its procedural protections, was an empty gesture. The President of the College had informed respondent of the existence of this review process on March 30, 1974, presumably with the understanding that the review would be meaningful (J.A. 41). Moreover, as amicus AAUP notes (Br. 9–10), the AAUP has formulated model procedures to be followed by colleges and universities in situations in which an instructor or professor who is denied tenure asserts that the initial decision denying tenure resulted from inadequate consideration by the faculty committee, was violative of academic freedom, or constituted discrimination on the basis of race, sex, religion or national origin. *AAUP Policy Documents and Reports*, *supra*, at 11–12, 19–21; see *Board of Regents* v. *Roth*, 408 U.S. 564, 579 n.17 (1972). The tenor of the AAUP provisions is that a tenure decision that follows a faculty committee's recommendation against tenure merely shifts the burden to the faculty member to trigger a fresh review by a different body in a formal review process. This "common law" of the educational community (*Perry* v. *Sindermann*, 408 U.S. 593, 602 (1972), quoting *United Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. 574, 579 (1960)), reflected in the AAUP policies that the College acknowledges it follows in other respects (J.A. 53), reinforces the view that the June 26 notice to respondent was not final.

The formal review process included here is wholly unlike that at issue in *Electrical Workers* v. *Robbins & Myers, Inc.*, *supra*, relied upon by petitioners (Pet. Br. 37) for the proposition that resort to grievance procedures does not toll the running of the statute of limitations or render the June 26 notice to respondent non-final. In *Robbins & Myers, Inc.*, grievance procedures were pursued after the complainant "stopped work and ceased receiving pay and

benefits"; unless the grievance procedures resulted in reinstatement she was not "entitled to be paid for the period during which the grievance procedures were being implemented." 429 U.S. at 234–235. There was also no indication that either party viewed the discharge itself as "anything other than 'final.'" *Id.* at 235. Here, in contrast, respondent was still employed and being paid by the College when he pursued the formal review process, and it does not seem that either party viewed the June 26 notification of nonreappointment as final. This, therefore, would appear to be a situation in which the parties operate pursuant to an arrangement "under which management's ultimate adoption of a * * * recommendation"—here the recommendation of the Board's Educational Policy Committee—"would be deemed the relevant statutory 'occurrence' " with respect to the denial of tenure. *Id.* at 234.[27]

At the very least, respondent may have had a reasonable expectation that the notice of nonreappointment in the letter of June 26 was not to be considered final, in view of the nature of the initial tenure decision and the subsequent review process, the President's suggestion in March that respondent pursue the grievance procedure, the hearing in May, the tone of the letter in June, the delay in offering the contract, and the Board's September 12 notice to him. The College's understanding of the nature of the initial tenure decision and review process, perhaps based on their form rather than their substance, would not be dispositive. See *Electrical Workers* v. *Robbins & Myers, Inc., supra,* 429 U.S. at 234–235; cf. *Perry* v. *Sindermann, supra,* 408 U.S. at 599–603.

Thus, there are strong indications in the record that the formal review process respecting the denial of tenure was not actually completed until September 12, 1979. Accordingly, even if the Court were to conclude that the lim-

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[27] Here, moreover, the final review process was conducted solely by management, through its Board of Trustees. In *Robbins & Myers, Inc.*, the contractual grievance procedure had progressed beyond the stage at which management had taken its final unilateral action.

itations period began to run before respondent's employment was terminated on June 30, 1975, respondent should be given the opportunity on remand to establish that the College did not in fact reach a "final" decision to deny him tenure and terminate his employment (and notify him of that decision) until sometime after July 2, 1974—within the applicable 300-day period. This was, in fact, the very approach followed by the Ninth Circuit in *Abramson* v. *University of Hawaii*, 594 F.2d 202 (1979), relied upon by petitioners here (Pet. Br. 33–34) for the proposition that the expiration of the terminal contract on June 30, 1975, was not the pertinent date for limitations purposes. Although the court in *Abramson* did indicate, contrary to the Third Circuit here, that the limitations period began to run before the faculty member terminated his employment, the Ninth Circuit nevertheless declined to rely solely on a notice of denial of tenure given to the faculty member in the June preceding the final academic year as the *final* decision in this regard (594 F.2d at 210):

> Appellant Abramson asserts that the University at all relevant levels regularly reviews tenure decisions during the terminal year. She offered to prove at least three instances in which faculty members who were originally denied tenure were reconsidered and granted tenure during their terminal years. The guidelines do not preclude explicitly such reconsideration. Moreover the record suggests the possibility that the June 30 deadline for notification was complied with in appellant's case to avoid an automatic tenure grant, rather than as the final step in appellant's consideration process. * * *
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> * * * Appellant has demonstrated the existence of a genuine issue of material fact. She should have an opportunity to demonstrate that the ordinary and generally accepted tenure decision process included a review of reconsideration requests in the final year and that in her case the decision of the President in May, 1972 to refuse to review her tenure denial constituted discrimination against her on the basis of sex.

Respondent should be given the same opportunity here, even if, contrary to our submission, the limitations period began to run before his employment was terminated.

CONCLUSION

For the reasons stated in point I of this brief, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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AUGUST 1980